

# Florida 404 Assumption

RA Briefing

20 January 2022

# Topics for Today

- Snapshot of current issues
- Fundamentals of 404 assumption (4 slides)
  - ◊ EPA's role
- Details on WOTUS issue
- Supplemental Slides



Everglades National Park  
Photo credit: Encyclopedia Britannica



# Snapshot of Current Status & Issues

- Annual report
  - ◊ Extended review to gather more detailed information
- WOTUS standard, NWPR usage
  - ◊ 9 objection letters
  - ◊ Future path (big picture)

# Fundamentals of CWA § 404 Assumption

- Congressional intent in the Clean Water Act - states and tribes to take the lead in managing aquatic resources
  - ◊ Assumed program \*\*not a delegated program\*\*
- Approval of a state's request to administer a 404 program rests with EPA
  - ◊ Regional Administrator w/concurrence from OW, OGC, & OECA
  - ◊ Corps involvement – big piece is determining which waters Corps will retain
- Basic tests:
  - ◊ Consistent w/requirements of CWA & implementing regulations
  - ◊ No less stringent than the requirements of CWA & implementing regulations
- State or tribally permitted activities must comply with the 404(b)(1) Guidelines



# EPA's Role re: 404 Assumption

## ➤ Prior to assumption

- ◆ Work with States/Tribes to enhance capacity/capability and develop programs
- ◆ Wetland Program Development Grants
- ◆ Coordination, provide information to State/Tribe exploring assumption

## ➤ Evaluate and approve/disapprove assumption request (< 120 days)

## ➤ Post: oversight of assumed program

- ◆ Review certain permit applications, seek Corps and Services input
- ◆ Enforcement of permits and violations when state/tribe requests assistance or does not take action
- ◆ Review/approval of modifications of state/tribal program for consistency w/CWA
- ◆ Withdraw program approval, if needed
- ◆ Review of annual reporting

# EPA Oversight of Assumed Programs

- State/Tribe transmits to EPA notices of certain proposed projects, for which EPA has not waived federal review (see following slide)
  - ◊ “Non-waiver” activities
  - ◊ EPA transmits notices to USACE, USFWS, & NMFS for input – this is not concurrence
- If EPA places conditions on or objects to a permit application:
  - ◊ State/tribe has 90 days to address EPA’s concerns or deny permit
    - ◊ Could be extended if EPA chooses to convene a public hearing based on the objections/conditions
    - ◊ The regulations require a public hearing at the state’s request or if one is warranted by significant public interest.
  - ◊ If EPA’s objection is not resolved, permit is transferred to USACE – federal coordination requirements triggered



# EPA Oversight cont.

## Waiver of federal review

- MOA with EPA identifies categories of activities for which EPA does not waive federal review, including non-discretionary & any other categories identified by EPA
- Per regulations, EPA cannot waive federal review of:
  - ◊ Draft general permits
  - ◊ Discharges w/reasonable potential for affecting T&E species (ESA)
  - ◊ Discharges that may adversely impact waters of another State or Tribe
  - ◊ Discharges with known or suspected toxic or hazardous pollutants
  - ◊ Discharges in proximity to public water supply intakes
  - ◊ Discharges within critical State/Federal areas
- Two additional categories in EPA-FDEP MOA:
  - ◊ Projects where site is owned/managed by federal entity or applicant is federal entity
  - ◊ Projects proposing to impact compensatory mitigation site

# The Numbers

- EPA received public notices for 39 “non-waiver” projects in 2021
- By June 30, 2021, FDEP had >1300 proposed actions under review (IP=Individual Permit, GP,=General Permit, NPR=No Permit Required verification request)
- By June 30, 2021, FDEP had:
  - ◆ Issued 6 IPs, 66 GPs, 72 NPR letters
  - ◆ Withdrawn 167 IPs & 152 GPs
  - ◆ Denied 17 GPs
  - ◆ In process: >400 IPs, >500 GPs, >400 NPR letters



# WOTUS regime, usage of NWPR

- Navigable Waters Protection Rule was vacated August 2021
  - ◊ EPA and Corps announced return to pre-2015 regulatory regime
- December 9: R4 letter to FDEP re: consistency with pre-2015 regulatory regime.
- December 17: WD issued 9 objections to projects under review where it was unclear whether jurisdiction applied was at least as stringent as pre-2015 WOTUS regime
- FDEP also transmitted a letter to EPA on December 17<sup>th</sup> with questions about WOTUS standard and legal matters
- Resolution pending
  - ◊ Some projects rely on applicant's acceptance of jurisdiction over "all waters" delineated
  - ◊ Some applicants requested jurisdictional assessment that relies on NWPR

# Bigger WOTUS picture re: assumption

- Application of appropriate standard
- EPA action re: projects beyond non-waiver categories?



# Supplemental Slides

# CWA §404 Authorities - Statute and Regulations

- CWA §404(g): States [and Tribes] may assume administration of the permit and enforcement program for discharges of dredged or fill material into the navigable waters within its jurisdiction, except
  - ◆ those “presently used, or susceptible to use (either in natural condition or with reasonable improvement) as a means to transport interstate or foreign commerce shoreward to their ordinary high water mark and their adjacent wetlands”
  - ◆ tidal waters and their adjacent wetlands
- CWA §404(h-i) and 40 CFR part 233
  - Lists State/Tribal requirements for assumption
  - Process to request 404 program
  - Lists assumption package contents
  - Describes EPA responsibilities





# CWA §404 Assumption Criteria

State or Tribal programs must be **consistent with** and **no less stringent than** the Act and implementing regulations. They must:

- ◆ Have equivalent scope of jurisdiction
- ◆ Regulate at least the same activities
- ◆ Provide for sufficient public notice & allow public participation
- ◆ Ensure compliance with the CWA 404(b)(1) Guidelines
- ◆ Have adequate enforcement authority



NJ Dixon's Pond wetlands

Photo credit: The Trust for Public Land

# Assumption Request Package

- Letter from State Governor or Tribal Leader
- Complete program description – describes scope and structure of the program
- Attorney General statement
- Copies of all applicable State/Tribal statutes and regulations for administering the program
- MOA with EPA Regional Administrator
- MOA with the USACE
  - ◊ Description of waters that are not assumed by the State or Tribe
  - ◊ Describes process for transferring in-process permitting and enforcement cases



# Complete Assumption Request Package

## *MOA with EPA Region 4 Administrator to include:*

- Categories of permits subject to federal review
  - “non-waiver activities”
- Provisions for State/Tribal reporting on program implementation
- EPA and State/Tribal roles and coordination regarding:
  - ◆ Compliance monitoring
  - ◆ Enforcement
- Provisions for modification of the MOA
  - ◆ Including transfer or withdrawal

# 120-day Review Process

- Public hearings
- Public comment & Response to Comments
- Federal agency comment (Corps, FWS, NMFS)
- Tribal consultation
- Other consultations, as appropriate



# Approval Process\*

- Assumption package submitted to EPA
  - ◇ 120 days to approve or disapprove the request\*\*
  - ◇ Includes 30-day review for package completeness
- Review period includes:
  - ◇ Notification to State/Tribe that package is complete
  - ◇ Package sent to USACE, USFWS & NMFS  $\leq 10$  days; comments to EPA  $\leq 90$  days; EPA responds directly
  - ◇ EPA review for consistency with Act and regulations
  - ◇ Solicit public input - notice published in FR and newspapers
    - ◇ Public hearing and 45-day comment period
    - ◇ Respond to comments in FR and response document
  - ◇ Tribal Consultation (as appropriate)
  - ◇ Other consultations, as appropriate
- RA approves/disapproves assumption request
  - ◇ HQ concurrence - OECA, OW, & OGC
  - ◇ Approved - State/Tribe is notified and notice is published in the FR
  - ◇ Disapproved - State/Tribe is notified and provided a list of necessary revisions

\*Key is coordination before assumption request package submitted

\*\*State/Tribe & EPA can agree to an extension